

§403(b) Tax Sheltered Annuities: 2009 Update for Non-Profit Organizations

April 2009

EVELYN A.
HARALAMPU

is a Partner and heads the ERISA, employee benefits and executive compensation practice of the Firm.



BACKGROUND

In 2007, the federal government issued comprehensive new rules which more closely regulate the §403(b) tax-deferred annuities of non-profit institutions. The new regulations now require, among other things, that non-profit employers sponsoring §403(b) retirement plans maintain a written plan document.

NEW IRS APPROVAL PROGRAM

Under Announcement 2009-34, the government is launching a program under which it will allow §403(b) vendors to obtain advance IRS approval of their prototype plan documents. The IRS will also provide a mechanism for individual employers to get approval on their individually designed §403(b) plans. Adopting an IRS-approved document will provide employers greater certainty that their §403(b) program meets standard requirements of the new regulations.

An eligible employer that adopts a standardized §403(b) prototype plan may rely upon the favorable IRS opinion letter issued for that plan (without filing an individual application with the IRS) if the only contributions to the plan are §403(b) deferrals and if all entities related to the employer participate in the plan. An eligible

employer that adopts a non-standardized §403(b) prototype document may rely upon the favorable opinion letter issued for that document for meeting the requirements of §403(b) for all issues except the non-discrimination rules. An employer may apply for an individual IRS letter showing that it meets the non-discrimination requirements.

PROVISIONS REQUIRED IN EVERY §403(B) DOCUMENT

The §403(b) plan document must contain a number of items such as:

- conditions for benefit eligibility;
- applicable limitations affecting contributions;
- the investment arrangements available under the plan;
- and how benefit distributions will be made.

The plan must also satisfy the universal availability requirement described below:

- describe the requirements for matching contributions (if matches are permitted);
- and set forth terms governing any hardship distributions, loans, plan-to-plan transfers, rollovers and contract-to-contract exchanges.

In addition, the plan must generally identify who is responsible for performing the various administrative functions under the plan.

UNIVERSAL AVAILABILITY

Under the new §403(b) requirements, all employees of an organization (with some limited exceptions) must be given the opportunity to make §403(b) deferrals under

a salary reduction agreement. The only employees who may be excluded from §403(b) participation are: (a) employees participating in a §457 or 401(k) plan or another §403(b) plan of the organization; (b) nonresident aliens; (c) students; and (d) employees who normally work fewer than 20 hours per week. The IRS will be auditing employers' compliance with this particular rule.

ACTION REQUIRED IN 2009

Before the end of 2009, sponsors of §403(b) plans are required to adopt a written §403(b) plan that satisfies the 2007 regulations. In addition, the plan sponsor must operate the plan in accordance with the new regulations and make its best efforts to retroactively correct any operational failures during 2009 to conform to the new guidance.

Existing plans must generally be updated for the new regulations effective as of the 2009 plan year.

FORM 5500 FILING OBLIGATIONS

If an employer does not make any discretionary determinations in administering a §403(b) arrangement, it is not required to file annually the Form 5500. Activities that will trigger the annual Form 5500 filing requirement include an employer's authorizing plan-to-plan transfers; processing distributions; making determinations regarding hardship distributions or the requirements of qualified domestic relations orders; determining who is eligible for loans; enforcing loan provisions; or negotiating changes to the terms of vendors' §403(b) products. Employers that make matching or other contributions to a §403(b) arrangement are required to file Form 5500 annually. The Form 5500 is an information return.

• continued

CONCLUSION

The 2007 regulations usher in a more regulated environment for §403(b) plans reflecting greater federal oversight of the retirement plans of non-profit organizations. Non-profit employers have until the end of this year to meet many of these new requirements, including adopting plan documents that comply with the new regulations. The new IRS document approval program will afford non-profit employers greater certainty that their plan documents comply with applicable law.

Evelyn Haralampu, Partner

Evelyn Haralampu heads Burns & Levinson's employee benefits/ERISA and executive compensation practice. She is also a member of the Tax, Corporate, Private Client and Labor, Employment and Employee Benefits Groups. Ms. Haralampu has extensive experience advising both businesses and non-profit entities. In particular, she counsels on employee benefits design, executive compensation programs, equity-based compensation, health care privacy, employment law, immigration and tax related issues. She assists employers with benefits and executive compensation issues in the context of corporate reorganizations, bankruptcies and succession planning. She also counsels individuals on benefits matters in the context of estate planning and property settlements in divorce. Ms. Haralampu represents clients before the Internal Revenue Service and U.S. Department of Labor, and counsels on ERISA controversies in the federal courts.

About Burns & Levinson

Burns & Levinson, with over 120 attorneys in four offices in New England, is a full-service Boston-based law firm. The firm has grown steadily and strategically throughout the years and has become a premier law firm with regional, national and international clientele. The firm has expertise in corporate law, finance, venture capital, private equity, tax, bankruptcy, lending and leasing, real estate, business litigation, government investigations and white collar crime defense, intellectual property - including patent law, and a large private client group - including estate planning, probate and trust litigation, divorce and other family law issues. In addition, the firm has a wholly-owned subsidiary office in Montreal, Quebec, to service its Canadian clients. For more information, visit Burns & Levinson at burnslev.com.

Massachusetts Offices
Boston, Hingham, Waltham

Rhode Island Office
Providence

BURNS & LEVINSON LLP

burnslev.com
HQ 617.345.3000

This Client Update provides general information and does not constitute legal advice.
Attorney Advertising. Prior results do not guarantee a similar outcome.

© 2009 Burns & Levinson LLP. All rights reserved.